U.S. Department of Labor

Office of Administrative Law Judges
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Issue date: 02Aug2002

In the Matter of:	:	
	:	
ROGER RAMEY,	:	
Claimant,	:	
	:	
v.	:	**Case Nos: 2001-BLA-00455**
	:	
CLINCHFIELD COAL COMPANY,	:	
Self- Insured Employer, and	:	
	:	
DIRECTOR, OFFICE OF WORKERS'	:	
COMPENSATION PROGRAMS,	:	
Party-in-Interest.	:	

Appearances:

For Claimant: Ron Carson, Lay Representative
Stone Mountain Health Services, Vansant, VA

For the Employer/Carrier: H. Ashby Dickerson, Esq. (with Timothy W. Gresham on the brief)
Penn, Stuart, & Eskridge, Abingdon, VA

Before: PAMELA LAKES WOOD
Administrative Law Judge

DECISION AND ORDER DENYING MODIFICATION AND BENEFITS

The above-captioned matter arises from a modification request relating to a claim for miner's benefits under the Black Lung Benefits Act,[1] 30 U.S.C. § 901 ***et seq.*** (hereafter "Act"). The pertinent implementing regulations appear at Parts 718 and 725 of Title 20 of the Code of

[1] The Act was adopted as Title IV of the Federal Coal Mine Health and Safety Act of 1969, and was amended by the Black Lung Benefits Act of 1972, the Black Lung Reform Act of 1977, the Black Lung Benefits Revenue Act of 1981, and the Black Lung Benefits Amendments of 1981. The pertinent amendments are discussed in 20 C.F.R. § 725.1.

Federal Regulations, as amended.[2] Benefits are awarded to coal miners who are totally disabled due to pneumoconiosis, or to the survivors of coal miners who died from pneumoconiosis. ***See*** 20 C.F.R. §725.1(a). Pneumoconiosis, commonly known as "black lung disease," is a chronic disease of the lungs and its sequelae (including respiratory and pulmonary impairments) resulting from coal mine employment and its attendant dust exposure. ***See*** 20 C.F.R. §725.101(a)(20).

The instant case involves a July 2000 modification request relating to the most recent denial, by the Benefits Review Board, of the claimant miner's claim, which was originally filed in 1981.

A formal hearing was held before the undersigned administrative law judge on November 29, 2001 in Abingdon, Virginia. Employer submitted a Prehearing Report at the time of the hearing, as permitted by the hearing notice of August 16, 2001. (Tr. 7 to 26). At the hearing, Director's Exhibits 1 through 165, Claimant's Exhibits 1 through 7, and Employer's Exhibits 1 through 10 were admitted into evidence. (Tr. 5 to 6, 26 to 29, 30 to 33.)[3] Claimant Roger G. Ramey (hereafter "Claimant") was the only witness to testify. The record closed at the end of the hearing, but briefs or written closing arguments were to be submitted 60 days thereafter. In accordance with an informal extension of time under the undersigned's correspondence of February 5, 2002, Employer submitted a timely closing argument under cover letter of February 11, 2002

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[2] Part 718 of title 20 of the Code of Federal Regulations is applicable to this claim, as it was filed after March 31, 1980. 20 C.F.R. § 718.2. These regulations were recently amended. ***See*** 65 Fed. Reg. 79,920 (Dec. 20, 2000). However, under 20 C.F.R. § 725.2 (2001), the 1999 version of specified sections (including sections 725.309 and 725.310) are to be applied to claims pending on January 19, 2001. Also, standards for the administration of clinical tests appearing in Subpart B of Part 718 (sections 718.101 through 718.107) only apply to evidence developed after January 19, 2001. In ***National Mining Assn. v. Dept. of Labor,*** – F.3d. – , Case No. 01-5278 (D.C. Cir. June 14, 2002), the U.S. Court of Appeals for the D.C. Circuit upheld a challenge to the amended regulations with the exception of several sections which were found to be impermissibly retroactive and one which attempted to effect an unauthorized cost shifting. The only one of the impermissibly retroactive regulations pertinent to the instant case is 20 C.F.R. § 718.204(a) (relating to total disability and providing that unrelated nonpulmonary or nonrespiratory condition causing disability will not be considered in determining whether a miner is totally disabled due to pneumoconiosis); however, the amended rule is consistent with existing Fourth Circuit precedent. Section and part references appearing herein are to Title 20 of the Code of Federal Regulations unless otherwise indicated.

[3] References to the Director's Exhibits, Claimant's Exhibits, and Employer's Exhibits admitted into evidence at the November 29, 2001 hearing before the undersigned, appear as "DX", "CX", and "EX", respectively, followed by the exhibit number. References to the hearing transcript appear as "Tr." followed by the page number.

The findings of fact and conclusions of law which follow are based upon my analysis of the entire record, including all documentary evidence admitted. Where pertinent, I have made credibility determinations concerning the evidence.

STATEMENT OF THE CASE

This case has had a long and convoluted procedural history extending over two decades and involving three hearings, four administrative law judge decisions, three Benefits Review Board decisions, and multiple modification requests. As noted above, the matter before me concerns a modification request (filed in July 2000 and supplemented in August 2000), relating to the Benefits Review Board's February 28, 2000 affirmance of the Judge Vivian Schreter-Murray's Denial of Request for Modification of July 21, 1998, which was the most recent denial of a claim originally filed in January 1981. (DX 1, 142, 148, 149, 151.)

The claim form filed on January 14, 1981 indicated that the Claimant was born on September 10, 1938 and that he stopped working in the coal mines in October 1980,[4] after 21 years, because of "breathing difficulty, cough, short of breath." (DX 1, 2). An examination was conducted by Dr. Bradley Berry on May 21, 1981. (DX 4 to 6, 8). The claim was denied by a claims examiner on June 19, 1981, because although the Claimant had established pneumoconiosis caused at least in part by his coal mine work, he did not show that he was totally disabled by the disease. (DX 9). Although Claimant timely requested a hearing, the case was not forwarded to the Office of Administrative Law Judges until November 27, 1985. (DX 11, 37). Following a hearing held before Judge John Bedford on January 5, 1988 in Bristol, Tennessee (at which the Claimant and his wife, Della Ramey, testified) (DX 50), Judge Bedford issued a Decision and Order Denying Benefits of April 20, 1988 (DX 57). Judge Bedford found that the Claimant had established "a maximum of 17 years" of coal mine employment; that he established pneumoconiosis based upon the medical opinion evidence (but not based upon x-ray evidence, presumptions, or biopsy evidence) under the section 718.202 criteria; that he was not entitled to the benefit of the presumption at section 718.305 because the evidence did not establish a totally disabling respiratory or pulmonary impairment under section 718.204; that he was entitled to the rebuttable presumption that his pneumoconiosis arose out of coal mine employment under section 718.203, which was not rebutted; and that the claim must be denied because he failed to establish total disability under section 718.204. (DX 57).

An appeal to the Benefits Review Board (hereafter "Board") was dismissed on April 28, 1989, because the Claimant had filed a motion for modification, and following remand, on December 19, 1990, a claims examiner denied the request for modification because the evidence

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[4] Information provided by Clinchfield Coal Company on January 29, 1985 indicated that the Claimant was employed from May 6, 1968 to September 1, 1981 in various capacities (including General Inside, Roof Bolter Operator, and Miner Helper). (DX 3). At the hearing before me, Claimant testified that he last worked as a coal miner on September 1, 1981 (Tr. 11), consistent with his testimony in 1988. (DX 50 at p. 13).

did not establish a change in conditions or a mistake in determination of fact. (DX 63, 66, 67, 69). A further appeal to the Board was dismissed and the matter was remanded to the Office of Administrative Law Judges (hereafter "OALJ") for a hearing on Claimant's motion, by Order of September 22, 1992, because the denial of modification at the deputy commissioner (district director) level was not directly appealable (DX 70,71, 75, 80). A hearing was held on June 30, 1993 before Judge Eric Feirtag in Abingdon, Virginia, and testimony was provided by the Claimant as well as by Dr. Emory Robinette. (DX 95). On January 7, 1994, Judge Feirtag issued a "Decision and Order – Denial of Benefits", which denied the claim because the Claimant had not established a material change in conditions or a mistake in determination of fact in Judge Bedford's decision. On the material change issue, Judge Feirtag found that the evidence did not establish complicated pneumoconiosis, and therefore Claimant could not establish a change in conditions on that basis; and that although Claimant could establish a basis for invocation of the section 718.305 presumption, the presumption was rebutted because it was established that cigarette smoking was the sole cause of Claimant's impaired breathing condition. (DX 109). On appeal, the Board vacated Judge Feirtag's opinion on the rebuttal issue and remanded the case to the OALJ, because he had not adequately discussed the evidence on whether pneumoconiosis was ruled out as a cause of Claimant's disability. (DX 120). Because of Judge Feirtag's unavailability, the case was transferred to Judge Vivian Schreter-Murray, who issued a "Decision and Order on Remand–Denying Benefits" of May 14, 1996, which found that the medical opinion evidence established that the section 718.305 presumption was rebutted. (DX 124). In its Decision and Order of May 27, 1997, the Board affirmed Judge Schreter-Murray's decision. (DX 130).

Another modification request was filed by Claimant under his representative's cover letter of August 20, 1997. (DX 131). The district director found that the Claimant had not established a basis for modification on December 17, 1997. (DX 135). Following receipt of Claimant's hearing request, the case was forwarded to OALJ on February 17, 1998 (DX 136 to 139). In response to Judge Schreter-Murray's show cause order of March 18, 1998 (which asked Claimant to show cause why a hearing should be held), Claimant submitted evidence, leading to Judge Schreter-Murray's "Denial of Request for Modification" of July 21, 1998.[5] (DX 142). That decision was affirmed by the Board on February 28, 2000. (DX 148).

Claimant filed the modification request now before me on July 31, 2000 (as supplemented by a modification request of August 9, 2000), which was denied by the district director on August 17, 2000, because the Claimant had not established a basis for modification. (DX 149, 150, 151, 157). By his representative's letter of October 31, 2000, Claimant requested a hearing and the

[5] Judge Schreter-Murray found that "a preponderance of the credible evidence again establishes that Ramey does not have coal worker's pneumoconiosis and that he does have a type of chronic obstructive respiratory disease that is characteristic of and entirely attributable to his long history of heavy cigarette smoking." (DX 142 at p. 8). Although Claimant argued that this finding was contrary to the law of the case (DX 145) which Employer argued was inapplicable (DX 146), the Board found that it comported with Fourth Circuit law. (DX 148).

claim was transferred to OALJ on February 9, 2001. (DX 160, 164, 165). As noted above, a hearing was held before the undersigned administrative law judge on November 29, 2001.

FINDINGS OF FACT AND CONCLUSIONS OF LAW

Issues/Stipulations

The following matters are at issue before me (DX 164, Tr. 6-7):

1. Whether the Claimant suffered from pneumoconiosis;[6]

2. Whether the pneumoconiosis arose out of coal mine employment;[7]

3. Whether the Claimant was totally disabled;

4. Whether the Claimant's disability was due to pneumoconiosis;

5. Whether the evidence establishes a change in conditions and/or that a mistake was made in the determination of any fact per 20 C.F.R. § 725.310 (1999); and

6. Length of coal mine employment beyond 13 years.[8]

Although other issues were listed on the CM-1025 Form (Timeliness, Miner, Post 1969 Employment, and Responsible Operator), counsel for the Employer indicated at the hearing that they were being withdrawn, and counsel also indicated that the issue of Insurance was listed in error; these issues are hereby deleted. (Tr. 6 to 7). Employer further noted that the issues listed under item 18 (and specifically the issue of the constitutionality of the regulations) were primarily listed for appellate purposes (Tr. 7). The parties stipulated at the end of the hearing that the

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[6] Judge Bedford's finding of pneumoconiosis (DX 57) has not been disturbed on appeal. (DX 120, 130, 148). In accepting Judge Schreter-Murray's reliance upon medical opinions disputing the existence of pneumoconiosis to rule out its contribution to the Claimant's disability, the Benefits Review Board relied upon a line of authority finding that a physician's opinion on disability causation based upon an alternative cause may have probative value even when an administrative law judge has found pneumoconiosis to exist. (DX 148).

[7] Judge Bedford's finding that the Claimant's pneumoconiosis arose out of his coal mine employment has also not been disturbed on appeal. (DX 57, 120, 130, 148).

[8] Employer stipulated to 13 years of coal mine employment. (Tr. 6). Judge Bedford's finding of "a maximum of 17 years" has not been disturbed on appeal. (DX 57, 120, 130, 148). Although this finding may be too vague to be controlling, the record also establishes 17 years of coal mine employment from 1964 to 1981, for the reasons stated in Judge Bedford's decision, and I find that the Claimant has established that he worked 17 years in coal mining. (DX 57).

Claimant had one dependent, his wife, so "Dependency" is no longer at issue. Although the parties did not withdraw the issue, a review of the Director's Exhibits and the procedural history set forth above (DX 1 to 165) indicates that the issue of "Refiled Claims" was listed in error, and it is hereby deleted from the list of issues. **SO ORDERED.**

New Evidence

Medical Evidence of Record on Modification. Evidence submitted in connection with the most recent modification request, which is now pending before me, includes:

(1) interpretations or reports relating to x-rays taken on October 15, 1998 (DX 162, 163), September 21, 1999 (CX 5), January 26, 2000 (DX 151, 162, 163), January 31, 2000 (DX 151, 162, 163), March 20, 2000 (DX 155, 159), July 18, 2000 (DX 149, 155), and August 21, 2000 (DX 154, 162, 163) and rereadings of x-rays taken on February 15, 1997, October 14, 1997 and March 6, 1998 (EX 3, 4, 5, 6, 7, 8);

(2) reports for pulmonary function studies of August 19, 1999 (CX 3), March 20, 2000 (DX 152), August 15, 2000 (CX 1), August 21, 2000 (DX 154), and September 13, 2001 (CX 4);

(3) arterial blood gases taken on October 15, 1998 (DX 153), October 28, 1998 (DX 153), January 26, 2000 (DX 151), March 20, 2000 (DX 153), and August 21, 2000 (DX 154);

(4) miscellaneous medical treatment and hospital records, including office notes for March 18, 1999, July 21, 1999, November 29, 1999, February 23, 2000, and July 18, 2000 by Dr. Emory Robinette (DX 149, 151); a discharge summary by Dr. B. Sarrouj, an echocardiogram, an electrocardiogram, and other records for a January 26, 2000 admission to Dickenson County Medical Center (DX 151); CT scan reports and interpretations by Drs. Paul Wheeler, William Scott, Jr. and Gregory Fino of a November 23, 1999 CT scan (DX 162, 163); and

(5) the medical review report of Dr. Kirk Hippensteel dated April 29, 1998, the report relating to Dr. Hippensteel's August 21, 2000 examination, and the transcript s of Dr. Hippensteel's March 3, 1998 and October 30, 2001 depositions. (DX 154; EX 2, 9, 10). [9]

Claimant's Testimony. Claimant Roger G. Ramey testified that he was a resident of Clintwood, Virginia; that he was born on September 1, 1938, and was 63 years old at the time of the hearing; and that he was 5 feet 8 inches tall and weighed 138 pounds. (Tr. 7-8). He testified that he worked in the coal mines for a total of 21 years, beginning in 1958 and continuing until September 1, 1981. (Tr. 8-9). His first employer was Rudd Patton. (Tr. 9). There were strikes and layoffs during that period, but he never was off work for a full year. (Tr. 10). He first

[9] When not clear from the record, I have consulted the website of the American Board of Medical Specialties (www.abms.org) for information on board certifications.

worked for Clinchfield in 1969 at Open Fork as a roof bolter and machine helper, which involved shoveling the dust out from under the machine. (Tr. 10). As a roof bolter, he would lift 25 pounds or 45 pounds, depending on the length of bolt. (Tr. 10-11). He also loaded coal in the truck mines. (Tr. 11). When last employed by Clinchfield, he was classified as a roof bolter, but he also scattered the rock dust and helped on the cutting machine when the miner helper wasn't there. (Tr. 11). He stopped working on September 1, 1981 due to his back and lungs, but his lungs problems dated from 1972 (Tr. 11-12).

It was in 1972 that he first saw Dr. Lyle, who said he had first stage black lung, so they provided him a letter so he could be brought out of the dust away from the face. (Tr. 12-13). Sometimes he could hardly catch is breath even though he wore a mask, and there would be dust when he emptied out the roof bolter pan, because there was no water on the roof bolter. (Tr. 12-13). Dr. Lyle has treated him since 1972, and he has also seen Dr. Gregori. (Tr. 13). Dr. Robinette has been treating him for his lungs since 1989. (Tr. 13-14). Claimant is on two theophylline pills per day, as well as two puffs of advair, and he also takes dioxen. (Tr. 14). He has been on oxygen continuously since 1984, when he was at Norton Hospital, to the best of his recollection, and Dr. Maine prescribed the oxygen. (Tr. 15-16). Claimant testified that he recalled coming to a black lung hearing in 1993, and that his breathing has gotten worse since then. (Tr. 16). His breath is shorter and he can no longer mow, go fishing or hunt; he just lays on the couch and looks out. (Tr. 16). The last time he hunted was in 1988, because he does not have a license to hunt out of a vehicle and he would have to be in a wheelchair. (Tr. 16-17). He has not fished since 1988 either, because he cannot sit or walk as necessary. (Tr. 17). On a typical day, he just lies around on the couch and takes oxygen. (Tr. 17). He can no longer work as a roof bolter on account of his breathing, because he cannot take the dust. (Tr. 17-18).

On cross examination, Claimant indicated that he had smoked back in 1988 when he saw Dr. Maine. (Tr. 18). He saw Dr. Hippensteel at Richlands on August 21, 2000, and he did not recall the smoking history he gave, but he "didn't smoke all that much." (Tr. 19). He didn't smoke in the mines. (Tr. 19). He stated that a recorded history of less than 10 to 12 years would "be about right," and he disagreed with a recorded history (by treating physician Dr. Robinette) of 35 years of smoking one pack per day (Tr. 19-20). In response to my questioning, Claimant testified that he smoked from approximately 1958 until the 1990's (1994 or 1996), generally one pack per day, sometimes a little more, but not when he was in the mines. (Tr. 22, 24). He was hospitalized in January 2000 by Dr. Sarrouj for pneumonia and he was put on four liters (of oxygen) until Dr. Robinette brought it down to two liters. (Tr. 23). He disputed telling Dr. Sarrouj that he smoked two packs per day for almost 50 years (referencing DX 151.6). (Tr. 24). When asked about elevated carboxyhemoglobin tests in 1991, 1992 and 1997, he verified that he was not still smoking in 1997 but was exposed to secondhand smoke. (Tr. 24-25). He indicated that when he had his oxygen tank, no one could light a cigarette around him. (Tr. 25).[10]

[10] At the hearing in 1993, Claimant testified that he smoked approximately one pack per day from age 20 (in 1958) until 1990 (32 years), but that he could smoke a pack and a half every four or five hours when he was nervous. (DX 95 at pages 45 to 47). In 1988, he testified that he had been smoking one pack

Claimant's testimony in June 1993 before Judge Feirtag appears at DX 95 and his testimony in January 1988 before Judge Bedford appears at DX 50.

Discussion and Analysis

In evaluating the instant modification request, I note that the Supreme Court has made it clear that the burden of proof in a black lung claim lies with the claimant, and if the evidence is evenly balanced, the claimant must lose. In ***Director, OWCP v. Greenwich Collieries,*** 512 U.S. 267, 28 BRBS 43 (CRT) (1994), the Supreme Court invalidated the "true doubt" rule, which gave the benefit of the doubt to claimants.

Modification Claim. The standards for granting a request for modification of a previous denial of benefits, as the Claimant seeks here, are set forth in the regulations at 20 C.F.R. § 725.310(a) (1999). That regulation states, in pertinent part:

> Upon . . . the request of any party on grounds of a change in conditions or because of a mistake in a determination of fact, the deputy commissioner [district director] may, . . . at any time before one year after the denial of a claim, reconsider the terms of an award or denial of benefits.

In a case involving a modification request, the threshold issue is whether the Claimant has established a change in conditions or mistake in a determination of fact, as provided in 20 C.F.R. § 725.310. To determine whether there has been a change in conditions, the administrative law judge must "perform an independent assessment of the newly submitted evidence, considered in conjunction with the previously submitted evidence, to determine if the weight of the new evidence is sufficient to establish the element or elements which defeated entitlement in the prior decision." ***Napier v. Director, OWCP***, 17 BLR 1-111, 113 (1993); ***Natolini v. Director, OWCP,*** 17 BLR
1-82, 1-84 (1993). An administrative law judge may grant modification premised upon a mistake in determination of fact based upon an allegation that the ultimate fact was mistakenly decided; "[t]here is no need for a smoking-gun factual error, changed conditions, or startling new evidence." ***Jessee v. Director, OWCP***, 5 F.3d 723, 725 (4th Cir. 1993). If a basis for modification is found, the claim must be considered on the merits, based upon all the evidence of record. ***See Kovac v. BCNR Mining Corp.***, 14 BLR 1-156, 1-158 (1990), ***modified on recon.***, 16 BLR 1-71, 73 (1992).

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daily for "[t]he last 20 year[s] I guess." (DX 50 at page 24). In her July 21, 1998 decision, Judge Schreter-Murray found that the 35-pack-year history recorded by Dr. Robinette in 1996 understated Claimant's smoking and, while inconsistent with the doctor's 1993 testimony estimating a history of 45-pack-years, "admits 32 years as opposed to the 5 year smoking history Ramey provided to Dr. Hippensteel." (DX 142 at page 5).

The prior modification request claim was denied by Judge Schreter-Murray for the following reason, which echoed the basis for her denial of the previous modification request (both of which denials were affirmed by the Benefits Review Board, DX 130, 148):

> A preponderance of the credible evidence again establishes that Ramey does not have coal worker's pneumoconiosis and that he does have a type of chronic obstructive respiratory disease that is characteristic of and entirely attributable to his long history of cigarette smoking. Following the prior review on Ramey's request for modification, I concluded that the employer had rebutted the presumption [set forth in section 718.305] based on Drs. Fino and Sargent having ruled out pneumoconiosis (clinical and statutory) as a cause of Ramey's totally disabling respiratory impairment. The Benefits Review Board affirmed. The opinions of the pulmonary disease specialists upon which I rely herein recognize that coal mine employment may cause clinical pneumoconiosis as well as a myriad of other pulmonary and respiratory diseases (statutory pneumoconiosis) including chronic obstructive pulmonary disease and bronchitis, but in well reasoned opinions, fully documented, have concluded that Ramey's chronic respiratory disease is due entirely to prolonged heavy cigarette smoking. Their opinions, which I accept, are supported by the bulk of the credible evidence. Unless Ramey can produce evidence sufficient to overcome that growing majority of highly qualified expert opinion that identifies the sole cause of his respiratory condition as cigarette smoking there can be no change in the result of this or any subsequent proceeding.

(DX 142 at pp. 8 to 9). Judge Schreter-Murray found no mistake in fact in the underlying record and no significant change since her previous denial of modification (DX 124) was affirmed by the Benefits Review Board. (DX 130).

The presumption to which Judge Schreter-Murray referred is set forth in section 718.305, which provides, in relevant part:

> (a) If a miner was employed for fifteen years or more in one or more underground coal mines, and if there is a chest X-ray submitted in connection with such miner's or his or her survivor's claim and it is interpreted as negative with respect to the requirements of §718.304 [complicated pneumoconiosis], and if other evidence demonstrates the existence of a totally disabling respiratory or pulmonary impairment, then there shall be a rebuttable presumption that such miner is totally disabled due to pneumoconiosis, that such miner's death was due to pneumoconiosis, or that at the time of death such miner was totally disabled by pneumoconiosis. . . . The presumption may be rebutted only by establishing that the miner does not, or did not have pneumoconiosis, or that his or her respiratory or pulmonary impairment did not arise out of, or in connection with, employment in a coal mine.

Subsection (e) provides that the section is inapplicable to any claim filed on or after January 1, 1982.

The gravamen of Judge Schreter-Murray's decision is that the Employer rebutted the section 718.305 presumption by establishing that the Claimant did not have coal worker's pneumoconiosis[11] and that his respiratory or pulmonary impairment was not caused in whole or in part by his coal mine employment, because it was caused entirely by cigarette smoking. In determining whether the Claimant has established a basis for modification based upon a change in conditions, I must first determine whether the Claimant has established by a preponderance of the newly submitted evidence, considered in connection with the evidence previously of record, that he has pneumoconiosis or that coal dust exposure contributed to his respiratory disability. Modification based upon a mistake in fact would require a determination that Judge Schreter-Murray's findings on either of these issues was mistakenly decided based upon the record as a whole.

Rebuttal of Pneumoconiosis. The regulations (both in their original form and as revised effective January 19, 2001) provide several means of establishing the existence of pneumoconiosis: (1) a chest x-ray meeting criteria set forth in 20 C.F.R. § 718.102, and in the event of conflicting x-ray reports, consideration is to be given to the radiological qualifications of the persons interpreting the x-rays; (2) a biopsy or autopsy conducted and reported in compliance with 20 C.F.R. § 718.106; (3) application of the irrebuttable presumption for "complicated pneumoconiosis" set forth in 20 C.F.R. § 718.304 (or two other presumptions set forth in § 718.305 and § 718.306); or (4) a determination of the existence of pneumoconiosis as defined in § 718.201 made by a physician exercising sound judgment, based upon objective medical evidence and supported by a reasoned medical opinion. 20 C.F.R. § 718.202(a)(1)-(4). Under section 718.107, other medical evidence, and specifically the results of medically acceptable tests or procedures which tend to demonstrate the presence or absence of pneumoconiosis, may be submitted and considered. The definition of pneumoconiosis in § 718.201 has been amended to provide for "clinical" and "legal" pneumoconiosis and to acknowledge the latency and progressiveness of the disease.

There is an additional provision in Part 718, applicable to claims (like this one) filed before January 1, 1982, which provides that "where there is other evidence of pulmonary or respiratory impairment, a Board-certified or Board-eligible radiologist's interpretation of a chest x-ray shall be accepted by the Office [of Workers' Compensation Programs]" when the applicable requirements had been met and there was no evidence of fraud. 20 C.F.R. § 718.202(a)(1)(i). However, as this provision does not indicate that a finding of pneumoconiosis is not rebuttable, it would not appear to affect the application of the section 718.305 presumption herein.

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[11] As noted above, Judge Bedford found pneumoconiosis based upon the medical opinion evidence. (DX 57). Judge Schreter-Murray disagreed, but considered the issue only in the context of rebuttal of the section 718.305 presumption. (DX 124, 142).

The new x-ray evidence is split on the issue of whether the Claimant has pneumoconiosis, with two positive readings, two 0/1 readings (which do not qualify as evidence of pneumoconiosis under the regulations), and 21 readings negative for pneumoconiosis. However, the most recent positive reading (1/0, q/t, six zones) of a July 18, 2000 x-ray by B-reader and pulmonologist Dr. Robinette (DX 149, CX 7) is outweighed by the negative readings of Drs. Wheeler and Scott, who are dually qualified as B-readers and board-certified radiologists, and B-reader Dr. Fino (DX 159). The three latter physicians did not find coal worker's pneumoconiosis on that x-ray, although noting other abnormalities, including a 1 centimeter mass. Drs. Wheeler, Scott, and Fino also found an August 21, 2000 x-ray to be negative for CWP, and B-reader Dr. Hippensteel read that x-ray as 0/1, s/t, 4 zones, also noting that it "does not look like CWP" (a reading which would not qualify as evidence of pneumoconiosis under the regulations). (DX 154, 162, 163). Dr. Michael S. Alexander, who is dually qualified as a B-reader and Board-certified radiologist was the sole interpreted of a September 21, 1999 x-ray, which he interpreted as showing 1/1, p/t, bilaterally. (CX 5, 6). However, this single reading is also outweighed by the multiple negative readings of essentially contemporaneous x-rays. Thus, the evidence does not support a finding of pneumoconiosis based upon the x-ray evidence under subsection (a)(1).

There were no biopsies, so pneumoconiosis cannot be established under subsection (a)(2).

Turning to the presumptions under subsection (a)(2), the applicability of section 718.305 is being considered herein and section 718.306 only applies to death claims. With respect to section 718.304, there is also some evidence that the Claimant had large opacities or lesions of the size associated with complicated pneumoconiosis, and the suggestion that he had complicated pneumoconiosis was addressed (and rejected) by Judge Feirtag in his January 7, 1994 decision (***see generally*** 20 C.F.R. § 718.304).[12] However, none of the reviewing physicians have now attributed the single one centimeter lesion found on recent x-rays or the nodule or mass found on the most recent CT scan to complicated pneumoconiosis. Thus, I do not find that Claimant has established complicated pneumoconiosis within the meaning of the regulation.

The new medical opinion evidence consists of the opinions of treating physician and board-certified pulmonologist Dr. Emory Robinette (in the form of treatment notes) and an examination report by board-certified pulmonologist Dr. Kirk Hippensteel. (DX 149, 154; CX 7; EX 10). Dr. Robinette diagnosed "underlying black lung disease with associated airflow obstruction," as well as bronchitis, but, while noting clinical findings and symptoms, he did not discuss the basis for a diagnosis of pneumoconiosis apart from his own x-ray reading. Dr. Hippensteel concluded that the evidence as a whole was "still insufficient to make a diagnosis of

[12] Section 718.304 provides for an irrebuttable presumption a miner is totally disabled due to pneumoconiosis or that his death was due to pneumoconiosis if the miner is or was suffering from a chronic dust disease of the lung which (a) when diagnosed by chest x-ray yields one or more large opacities (greater than 1 centimeter in diameter) which would be classified as Category A, B, or C under the pertinent standards or (b) when diagnosed by biopsy or autopsy yields massive lesions in the lung or (c) when diagnosed by other means would reasonably be expected to yield the results described in (a) or (b).

coal workers' pneumoconiosis" and he opined that the Claimant's pulmonary and respiratory impairment was due to his past history of smoking, and he attributed a recent improvement in diffusing capacity to Claimant's recent abstinence from smoking. He discussed the basis for his opinion further at his depositions, at which he opined that the Claimant did not have any pulmonary or respiratory impairment attributable to coal mine dust exposure and that Claimant's cigarette smoking was the cause of his disabling respiratory impairment. (EX 2, 10).

Looking at the other evidence of record, there were two CT scan interpretations, by Drs. Wheeler and Scott. Each of these was negative for CWP. (DX 162, 163). In addition, hospital records dated February 1, 2000, signed by Dr. Sarrouj listed discharge diagnoses of "bilateral interstitial pneumonia, much improved," "respiratory failure, much improved," "chronic obstructive pulmonary disease with acute exacerbation," and "pneumoconiosis," but did not indicate the basis for these diagnoses, nor did he indicate the extent to which they were caused, contributed to, or aggravated by coal mine dust exposure. (DX 151). The records also indicated that the Claimant was instructed to stop smoking. ***Id.***

Looking at section 718.202(a) as a whole, I find that as a whole it does not support a finding of pneumoconiosis (either "clinical pneumoconiosis" or "legal pneumoconiosis") based upon a consideration of the newly submitted evidence, in the context of the evidence previously of record. In this regard, the x-ray evidence preponderates against a finding of pneumoconiosis, and the CT scan evidence also is negative for pneumoconiosis. Even if Dr. Robinette's and Dr. Sarrouj's diagnoses are afforded additional weight because they are treating physicians (***see generally*** 20 C.F.R. § 718.104(d)), their opinions are essentially conclusory in nature and appear to be based solely upon the x-ray readings (in Dr. Robinette's case) or a history (in Dr. Sarrouj's case). These opinions add little to the evidence previously of record. In contrast, Dr. Hippensteel has explained the basis for his conclusions in some detail in his report and at both of his depositions, and his opinion is consistent with the preponderance of the previously submitted medical opinion evidence indicating that the pattern of respiratory disability shown here is not typical of that associated with coal mine dust exposure. Thus, a change in conditions cannot be established.

Turning to modification based upon a mistake in determination of fact, while the issue is a closer one, I do not find a mistake in fact in Judge Schreter-Murray's determination that the Claimant does not suffer from pneumoconiosis. Judge Shreter-Murray's decisions were upheld by the Board, and I cannot find any error in her weighing of the evidence before her. The result is the same when the newly submitted evidence is considered. In fact, the newly submitted evidence provides even less support for a finding of pneumoconiosis, whether legal or clinical, than the previously submitted evidence.

Rebuttal of Impairment due to Coal Mine Employment. As the evidence does not support a finding of pneumoconiosis, ***a fortiori***, it does not support a finding of impairment due to pneumoconiosis or coal mine employment. However, even if pneumoconiosis were established, the newly submitted evidence does not establish a basis for disturbing Judge Schreter-Murray's

finding that the Claimant's pulmonary and respiratory impairment was due entirely to cigarette smoking, and that therefore pneumoconiosis (clinical or legal) may be ruled out as a cause. In this regard, Dr. Robinette does not address the issue of the cause of the Claimant's impairment in his recent records, and he does not discuss the significance (if any) of the Claimant's smoking history.[13] Thus, even if Dr. Robinette's recent reports are afforded additional weight because he is a treating physician (***see generally*** 20 C.F.R. § 718.104(d)), they do not contradict the other medical opinions of record. On the other hand, Dr. Hippensteel, a highly qualified pulmonologist, has provided a well-reasoned opinion, which he elaborated further at his depositions of March 3, 1998 and October 30, 2001, attributing all of the Claimant's disability to cigarette smoking.[14] Dr. Hippensteel has had the benefit of a review of all of the evidence of record and I generally adopt his opinion.[15] (DX 154; EX 2, 9, 10). With respect to the evidence previously of record, I agree with Judge Schreter-Murray's analysis of it. (DX 124, 142). Looking at the newly submitted evidence in conjunction with that previously of record, I find that the preponderance of the credible evidence establishes that Claimant's cigarette smoking for approximately 36 years, ending in the 1990's, was the sole cause of Claimant's respiratory and pulmonary disability and therefore his impairment did not arise out of his approximately 17 years of underground coal mine employment ending in 1981. There is therefore no basis for establishing this element of the claim so as to prove a change in conditions, nor is there any basis for setting aside Judge Schreter-Murray's finding based upon a mistake in determination of fact.

Conclusion

In view of the above, I find that the Claimant has not established a basis for modification. His claim must therefore be denied on the basis of the previous denial and it is therefore not necessary to consider the other issues.

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[13] At the 1993 hearing before Judge Feirtag, Dr. Robinette testified that the Claimant's occupational exposure to coal dust contributed at least in part to his respiratory disability and he discussed the possible contribution by smoking. (DX 95 at p. 108).

[14] As Employer has noted, Claimant has not been entirely consistent in describing his smoking history and I do not find him to be a reliable historian. (See footnote 10 above). I attempted to clarify this matter at the hearing with some difficulty. Based upon Claimant's testimony and the other evidence of record, I find a 36-pack year history (based upon one pack of cigarettes per day from 1958 to 1994) is a reasonable minimum estimate, although he may have smoked more than a pack daily during a portion of this time period and less on those days that he mined, and he may have smoked intermittently after 1994, based upon Dr. Hippensteel's 1997 examination findings (DX134; EX 2) as compared with his August 2000 findings (DX 154) and the records of Claimant's January 2000 hospitalization (when Dr. Sarrouj "instructed [him] to stop smoking.") (DX 151).

[15] Although his discussion was generally thorough, Dr. Hippensteel mentioned the fact that the Claimant was on home oxygen but did not comment upon what if any effect such oxygen would have upon arterial blood gas testing. (EX 10).

ORDER

IT IS HEREBY ORDERED that the claim of Roger G. Ramey for modification and for black lung benefits under the Act be, and hereby is, **DENIED**.

A

PAMELA LAKES WOOD
Administrative Law Judge

Washington, D.C.

NOTICE OF APPEAL RIGHTS: Pursuant to 20 C.F.R. § 725.481, any party dissatisfied with this Decision and Order may appeal it to the Benefits Review Board within thirty (30) days from the date of this Decision by filing a Notice of Appeal with the Benefits Review Board at P.O. Box 37601, Washington, D.C. 20013-7601. A copy of this Notice of Appeal must also be served on Donald S. Shire, Associate Solicitor for Black Lung Benefits, 200 Constitution Avenue, N.W., Room N-2117, Washington, D.C. 20210.